FILE COPY.

228.

No. 610.

Office Supreme Court U. S.
FILED
APR 14 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1904.

THE UNITED STATES,
Petitioner,

vs.

EMIL DIECKERHOFF ET AL.,
Respondent.

No.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHARLES CURIE,
W. WICKHAM SMITH,
Attorneys for Respondent.

W. WICKHAM SMITH,
Counsel.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1904.

THE UNITED STATES,
Petitioner,

v.

EMIL DIECKERHOFF *et al.*,
Respondents.

No.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

An examination of the record in this case, and of the petition now filed by the Solicitor-General will disclose to the Court the fact that the Government has never been able to quite make up its mind what relief it is entitled to. It insists that the Court of Appeals gave the wrong construction to the bond and the statute under which it was given, but hesitates to take any stand as to what is the proper construction of the bond and of the statute. It originally sued for double the estimated value of the package not returned (Record, fol. 24). Subsequently, it amended its complaint and sued for double the value of the importation (Rec., fol. 45).

The Solicitor General in his petition now states that the Government is entitled to recover either double the estimated value of the importation, or double the estimated value of the package not returned, as liquidated damages under the terms of the "bond" (Petition, p. 2). But later on he states (p. 11), "The Government maintains that the sum named—double the estimated value of the importation—is a penalty or punishment imposed by law for violating a duty enjoined by law." Here there is nothing said about liquidated damages.

No court can have been guilty of very grave error which has decided that a suitor who could not make up his own mind what relief he was entitled to was not entitled to any at all.

The bond in question provided (Rec., fol. 38) that "the Collector of Customs aforesaid shall endorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and endorsed as aforesaid."

Here we have a bond expressly providing for a penalty, calling it by that name, and yet the Government contends that an amount not fixed in the bond, but to be estimated by a subordinate government official, after the bond has been made and executed, shall be treated as liquidated damages. This is contrary to the decision of this Court in Tayloe *vs.* Sandiford (7 Wheat., 11) where Chief Justice Marshall said:

> "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated

> damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting party. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the Court to say that their own words do not express their own intention."

In discussing the statute and the bond the learned Solicitor-General seems to assume that the only possible breach of the condition of the bond would be an absolute failure to return a package. But, under the statute and the bond, it is just as much a breach of its conditions if the package is returned intact and has never been opened, except in the presence of customs officers, but without the Collector's consent; or has been opened with the express consent of the Collector, but not in the presence of customs officers. If the Government claim be correct, an importer who has obtained the consent of the Collector to the opening of packages and can prove by twenty-five witnesses that, after being opened, they were nailed up without the removal of any of their contents, may be mulcted in the full penalty of the bond, because no officer of the customs happened to be present at the time of the opening. Is this contention worthy of being made the subject of argument in this Court?

It is unnecessary to review the numerous authorities cited by the Solicitor-General, where it has been held that the amount named in a bond or statute was a penalty or punishment imposed by law for violating a duty enjoined by law. The fundamental difference between these cases and the case at bar, which the Solicitor-General overlooks, is that in the bonds or statutes referred to in such decisions the amount

o be recovered was absolutely fixed, whereas, in the case at bar, the agreement of the parties was that the Collector should estimate the value of each importation, and that double the value so estimated should be held to be the penalty of the bond. In other words, his contention in this case is not that a statute fixes a punishment, or that an agreement under seal fixes a punishment, but that an officer of the customs can estimate the value of an importation at any amount he pleases, and that double that amount is to be treated as a statutory penalty for violation of law. It is safe to say that no statute can ever be passed in this country which will provide such a system of punishment, and that no parties of sound mind and competent to contract will ever contract for anything of the kind.

The whole burden of the Solicitor-General's argument is that unless the Government can recover on these bonds without proof of damage it will never be able to recover on them at all, because the failure to return the goods leaves them without any proof of damage, and that therefore the Government will either have to leave the door open for fraud or examine all the goods of every importation. This argument might have some weight if it were invoked as to a recent enactment, but the statute in question has been in force for 75 years, and the Government has managed to collect its revenues without examining all the packages in every importation during this period, and it was not until the beginning of the present suit, so far as can be learned, that the claim that the Government could recover on these bonds without proof of damage was ever made. The learned Solicitor-General seems to be unduly alarmed.

It is, of course, incorrect to say that a failure of an importer to return a package leaves the Government powerless to prove fraud in an importation.

In the case of recent prosecutions for fraud on the revenue in the City of New York, the Government proved, by overwhelming evidence, in January, 1904, that packages which had been delivered to the importer in the spring of 1901 contained goods differing in quality, quantity and value from those described in the invoice. The entire argument of the Solicitor General is disposed of by the following language of the opinion of the Circuit Court of Appeals:

> "With the package in their possession it is a very easy matter to ascertain its contents, but such information may be obtained otherwise. The persons who packed it or saw it packed, the persons who unpacked it or who took possession of its contents could show what those contents were. It might be an expensive matter to procure this testimony as to any missing package, but the penalty of the bond is large enough to cover such expenses and all additional duties besides—these are the damages which the Government sustains by reason of the non-return of the package, and in our opinion the bond is conditioned to make good such damages within the limit named in the penalty—double the estimated value of the importation."

Not only do Courts generally view with disfavor demands to collect penalties, but the laws of the United States contain an express provision forbidding such a course. Section 961 of the Revised Statutes provides that in a case like this "the Court shall render judgment for the plaintiff to recover so much as is due according to equity." The learned Solicitor-General seeks to meet this statute by saying that the collection of double the value of nine-tenths of an importation for failure to return one package unopened is equity. The obvious an-

swer is that if this be equity what would be left for the term inequity to apply to?

I cannot better conclude this brief response than by quoting the concluding paragraph of the opinion of the Circuit Court of Appeals:

> "The argument that great hardship might result from any particular construction of an Act of Congress is not usually of much weight, but it may fairly be considered that if the sum named in the bond were held to be liquidated damages, an importer might not infrequently be fined $50,000 or $100,000 when his importation was a large one, merely because he had opened a single package worth maybe $100 in the presence of an inspector, but without the written consent of the Collector or Surveyor."

The petition should be denied.

New York, April 12, 1905.

Charles Curie,
W. Wickham Smith,
Attorneys for Respondent.

W. Wickham Smith,
Counsel.